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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1925

No. 10[illegible] 365

DR. A. W. BOYD, PETITIONER,

vs.

UNITED STATES OF AMERICA.

PETITION OF DR. A. W. BOYD FOR WRIT OF CERTIORARI AND SUPERSEDEAS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WHITAKER & FOUST,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 1075.

DR. A. W. BOYD, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION OF DR. A. W. BOYD FOR WRIT OF CERTIORARI AND SUPERSEDEAS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner respectfully submits that he is very much aggrieved by a judgment of the Court of Appeals for the Sixth Judicial Circuit affirming a sentence of conviction of the District Court of the United States and the Eastern District of Tennessee for the alleged violation of the Harrison Narcotic Act pronounced against him on April 6, 1925, sentencing petitioner to two years' confinement in the Federal

prison and imposing against petitioner a fine of $1,000, and respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, and shows:

Petitioner, Dr. A. W. Boyd, defended said prosecution on the "good-faith proposition"; that he is a physician of long standing and a duly registered physician under the Harrison Narcotic Act; that in treating narcotic addicts he had a remedy that he believed would effect a cure which was an anti-acid remedy known as Numbers 1, 2, and 3, contained in small-sized bottles that he gave the patient as a cure while gradually reducing the amount of morphine he thought the patient required.

Court of Appeals Tr., 82, 83, 84, 86, 89, 90.

The Government prosecuted on the theory that petitioner, Dr. A. W. Boyd, was guilty notwithstanding his good faith in attempting to cure addicts if he prescribed to the addicts set out in the indictment, Annie Davis, O'Hara, O'Neal, and Goodman, more morphine at any one time than was sufficient for one dose. Petitioner admitted he did this, prescribing at one time a sufficient quantity to last the patient, taken in separate doses, for a period of four or five days. There was no dispute about this. The trial judge charged the jury that if petitioner "wrote prescriptions for amounts of morphine for a great number of doses of morphine more than was sufficient for the necessity of one particular administration of it and that by virtue of his writing these prescriptions for these large amounts or excessive amounts of morphine, more than sufficient for any one administration of it, * * * then the law declares the defendant has violated the law." This charge was excepted to *after* the jury returned the

verdict of guilty and assigned as a cause for a new trial in this case.

Court of Appeals Tr., 109, 110.

The Court of Appeals held that notwithstanding this charge was not excepted to at the time given it was a correct charge under the authority of United States *v.* Behrman, 258 U. S. 280; Hobart *v.* United States (6 C. C. A.), 299 Fed. 784; Simmons *v.* United States (6 C. C. A.), 300 Fed. Rep. 321; Webb *v.* United States, 249 U. S. 96; Jin Fuey Moy *v.* United States, 254 U. S. 189.

See opinion of Court of Appeals, April 6, 1925, which is hereto attached and made a part of this petition.

Transcript of the record in the Court of Appeals and of the judgment and opinion of said Court are herewith filed as Exhibits "A," "B," and "C" to this petition and made a part of the same. Motion was made to stay the judgment of the Court of Appeals pending the application for this writ of certiorari, which motion was granted and expires on the 6th day of May, 1925. Said motion and the order granting the same is filed as Exhibits 1 and 2 to this petition and made a part of the same.

The grievance complained of is as to the holding of the Court of Appeals affirming the correctness of the charge herein set out. The reason relied on for a review of this holding is that the question of law involved is of great public importance especially to the medical profession throughout the country.

Wherefore, the foregoing matters being considered your petitioner prays that the Court will grant its writ of certiorari and supersedeas or a stay order staying the judgment of the

United States Circuit Court of Appeals for the Sixth Circuit until this petition is passed upon and requiring that Court to certify a full and complete transcript of the record in the above entitled cause to this court for review, and that this Court will, therefore, proceed to correct the errors complained of, reverse the judgment for the petitioner and remand the cause and give petitioner such other and further relief as the nature of the case may require and to the court may seem proper in the premises, and your petitioner will ever pray.

A. W. BOYD.

WHITAKER & FOUST,
For Petitioner.

Certificate.

I certify that I am attorney for and of counsel for the petitioner herein; that the allegations contained in said petition are true, and that said petition is, in my opinion, well founded in point of law.

SAM E. WHITAKER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Court is asked in this petition to call up for a review on certiorari the construction by the Circuit Court of Appeals for the Sixth Circuit its interpretation and construction of the act of Congress which is known as the "Harrison Narcotic Act."

The subject matter involved is whether or not a prescription or prescriptions, given in good faith by a duly registered physician under the Harrison Narcotic Act, for more morphine contained in one or more prescriptions than is sufficient for one dose, a violation of said act.

It is our insistence that the cases of Webb *et al. v.* United States, 249 U. S. 96; Jin Fuey Moy *v.* United States, 254 U. S. 189; United States *v.* Behrman, 258 U. S. 280, in place of holding that a physician issuing a prescription for more morphine than is necessary for one dose is guilty of violating the Harrison Narcotic Act, holds quite to the contrary. In the Webb case the Court says:

> "But on the contrary it is plainly held that had the prescription or prescriptions been used in good faith and in the course of professional treatment in the attempted cure of the habit then Webb would not have been subject to the penalty of the Harrison Narcotic Act."

In the Jin Fuey Moy case the court says:

> "That he issued them to persons not his patients, and not previously known to him, professed morphine users, for the mere purpose, as the jury might find, of enabling such persons to continue the use of the drug or to sell it to others."

There is no such suggestion in this entire record against petitioner.

In the Behrman case the court says:

> "It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the Act; * * * Undoubtedly doses may be varied to suit different cases as determined by the judgment of a physician."

We submit that under these authorities decided by this honorable Court that the certiorari should be granted; that *this Court* may pass directly upon the question herein involved; that lawyers, and more particularly physicians, may have the last word on this controverted legal question under the Harrison Narcotic Act so that capable and well-ordered doctors throughout the country may know, without cavil or doubt, how to conform to this important and well-meaning Act of Congress.

If the conclusion reached in the Circuit Court of Appeals in this case is sound no doubt practically every physician throughout the country has infracted the Harrison Narcotic Act and could be subjected to its mortifying penalties.

Respectfully submitted,

WHITAKER & FOUST,
Attorneys for Petitioner.

[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 95

DR. A. W. BOYD, Petitioner,

vs.

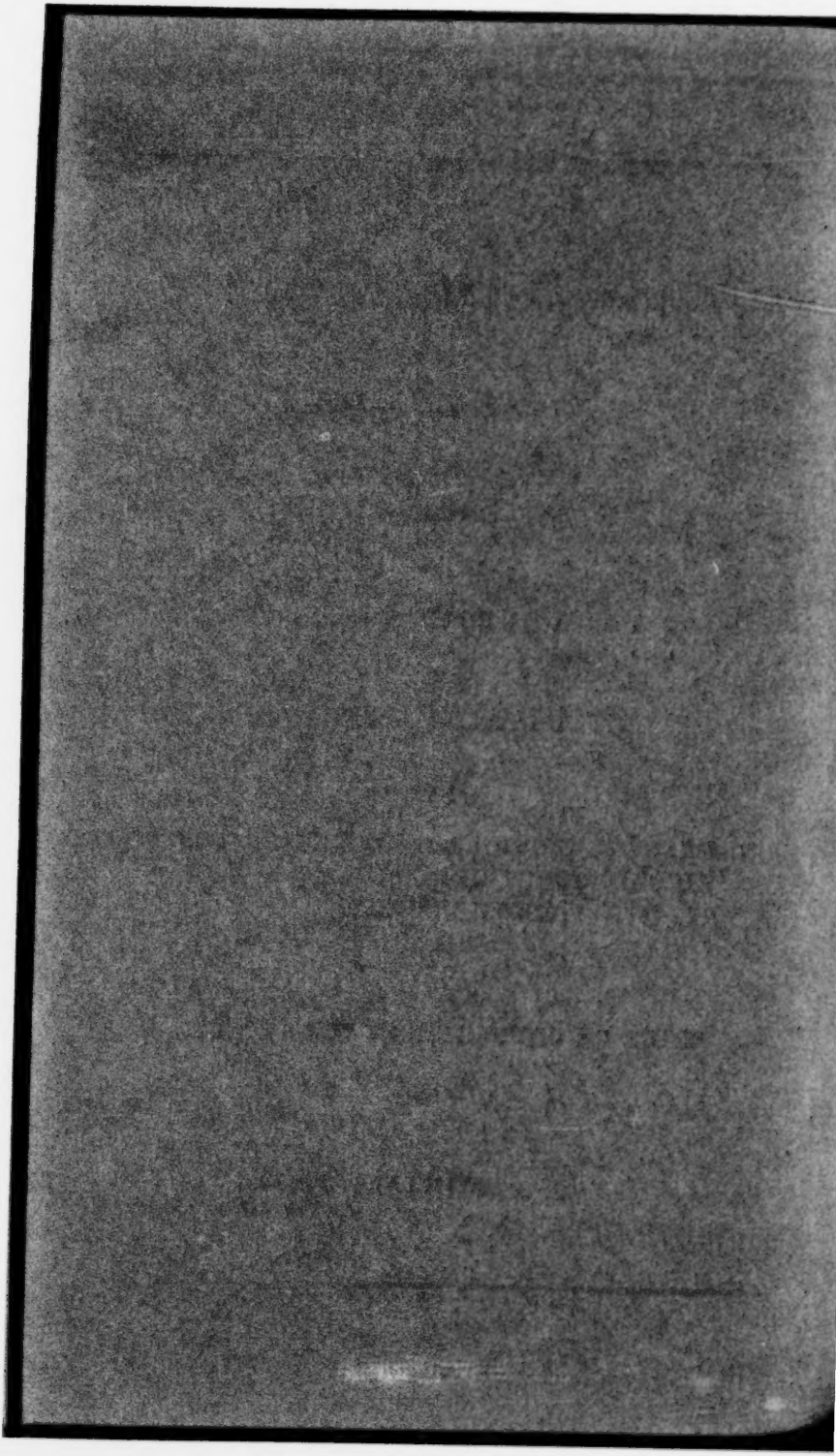
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF COUNSEL FOR PETITIONER

WHITAKER & ROUST,

Attorneys for Petitioner.



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IN THE

Supreme Court of United States

OCTOBER TERM, 1925

No. 365

DR. A. W. BOYD, Petitioner,

versus

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF COUNSEL FOR PETITIONER.

May It Please the Court:

Dr. A. W. Boyd, a duly licensed and registered physician, (R. 14), was indicted and convicted in the United States Court of the Southern Division of the District Court of Tennessee at its November term, 1923, for violating section 2 of the Harrison Anti-Narcotic Act, and was fined and sentenced to the penitentiary.

R. 12, 13.

Petitioner, Dr. Boyd, interposed as a defense the "good faith doctrine."

The cause was duly and regularly taken to the Court of Appeals for the Sixth Judicial Circuit.

R. 13, 88, 90, 91, 92, 93, 94, 95.

This Court affirmed the sentence.

R. 95, 96.

From the action of the Court of Appeals petition for certiorari was duly filed and granted, bringing the case to this Honorable Court for review and the cause placed on the summary docket and advanced for argument on Monday, November 2nd, 1925.

R. 97.

STATEMENT OF THE CASE

Perhaps it would not be wholly out of order to give a *very* brief "statement of the case."

On the trial in the lower court the Government showed by its officers and druggists in Chattanooga, by way of prescriptions, a considerable use of narcotics by petitioner.

R. 14-19.

This was the only evidence offered by the Government tending to show a violation of the Act in question.

To offset this it was shown by the *Government's witnesses*, including the three set out in the indictment, that:

(1) Dr. Boyd thought he had a remedy for the relief and possible cure for morphinism.

R. 17.

(2) That his treatment for each one of the addicts set out in the indictment was beneficial to the patient, materially reducing the amount of morphine and restoring the patient from absolute invalidism to a working basis.

R. 20, 21, 22, 25, 32, 43.

Their testimony can be measurably summarized by the evidence of James Pinson, who was an overseas soldier, and contracted the habit of morphinism in the Government hospital. He states that he was a tubercular, and that since Dr. Boyd's treatment of him he has steadily improved, taking less and less morphine during Dr.

Boyd's treatment of him; that he was taking about ten grains a day when he went to Dr. Boyd and weighing about one hundred pounds; that his weight had been increased to one hundred thirty pounds by the administration of an anti-acid powder treatment intended as a corrective and a cure of the morphine habit, and that he had all but permanently relieved him.

R. 43, 44.

(3) That he treated them without price—that is to say, that if they didn't have the money for a prescription or didn't have the money for the acid known as 1, 2 and 3, or the money for dressing the sores or afflictions incident to their physical condition which brought on the morphine habit, that he would furnish the prescription and oftentimes the morphine and attend to healing the primary affliction without price—without charge for prescription for morphine or other medical attention.

R. 43, 44.

(4) That the amount of morphine used, and the number of prescriptions issued by Dr. Boyd depended upon the large number and condition of the patients he was treating, the number justifying the amount of morphine purchased and the number of prescriptions issued.

This closed the Government's testimony with the exception of the opinion of Doctors as to the best method for treating morphinism, and testimony as to petitioner's character.

As the defense was predicated on the "good faith doctrine," counsel for petitioner, on the close of the Government's testimony, moved the Court for a directed verdict on three specified grounds, the first being that there was no evidence to support the verdict for the Government, and the third, that the effort of the defend-

ant, Dr. A. W. Boyd, was a "good faith" effort in that he was administering morphine to his patients in an honest, professional undertaking to cure them of the morphine habit, etc.

R. 45.

Which motion was overruled, etc.

R. 45.

Whereupon, petitioner offered his proof. The first paragraph of petitioner's testimony is:

> "I am sixty-four years old. I have been living in Chattanooga thirty-seven years. * * * I have been a practicing physician thirty-nine years. Have practiced in Chattanooga thirty-seven years. In all my professional life I never sold or gave away or in any wise used morphine or other narcotics *except to use it for the purpose of my profession.* Never sold a grain in my life."

R. 45.

Then the petitioner proceeds to discuss treatment of morphinism from a professional point of view, and finally said:

> "I * * * treated at my own expense. I bought the drug and gave them. There are ninety of them, eighteen of which I cured. * * * * I treated them for the disease. * * * * I run about twenty or thirty addicts that I have treated on the general average. * * * * The amount of morphine shown by the Government given to these particular patients that I treated was absolutely necessary in the proper treatment." etc.

R. 47, 48.

Then again:

> "I have talked to the Doctors and told them of this discovery of mine. I said, 'Let's join together and cure these people'."
>
> R. 49.

Then again:

> "I have tried to treat them from a scientific professional point of view absolutely, as many as I could, without any regard for compensation."
>
> R. 49.

Then again:

In speaking of the amount of morphine prescribed to particular patients being about the same amount of morphine in each prescription for nearly a month and explaining why, this witness said:

> "Those conditions that show that they run the same for nearly a month was, as I told you before, that the County Physician had made an allowance of so much. He gave the druggist a card that this patient should have this amount for so many days. *If I wrote the prescription for any more or less they did not fill it. I had no will in it so I had to work on the patient and say 'Here, I don't want you to take this much.'* That was done so that they might have the necessary amount. They would not fill it if I wrote it for less." (The italics are ours.)
>
> R. 48.

This explains in "good faith" why these prescriptions continued at the same amount for the period of time appearing in the proof and in place of it being an evidence of "bad faith" it explains and shows evidence of "good faith."

Following this testimony Dr. Cooper Holtzclaw, the Nestor of the medical profession in Chattanooga, states:

> "Dr. Boyd has submitted to me his method of treatment of these morphine addicts, and I consider it a sound, sane, and successful treatment of the trouble."

R. 61.

Some of the addicts, who were witnesses for defendant, testify to the beneficial effects of Dr. Boyd's treatment, bringing them from invalidism to health and work.

R. 67, 69, 70, 72, 73.

This closed the proof, with the exception of some minor and immaterial controversies, and the varying opinion of Doctors as to whether or not the proper treatment of morphinism was by the "iron hand" or "gradual reduction process." At the end of all the testimony counsel for petitioner again moved the Court for a directed verdict for the same reason assigned at the close of the Government's proof.

R. 80, 81.

Which motion was overruled, etc.

WHEREUPON, the Trial Judge charged the jury, setting up at the outset of his charge with reasonable satisfaction the "good faith doctrine," and then proceeded to *destroy and set at naught* the "good faith doctrine" by charging the jury as follows:

> "I further instruct you in this case that if you believed beyond a reasonable doubt that these different parties, Annie Davis, O'Hara, O'Neil, Goodman, applied to this defendant Boyd for drugs or for prescriptions for drugs, and if you believe that beyond a reasonable doubt that this

defendant Boyd knew that they were addicts, *and* that although he was undertaking to cure them of the drug addiction, if you believe beyond a reasonable doubt that as to these patients or so-called patients or as to any of them, that he wrote for them these prescriptions or for any of them the prescriptions set out in the indictment, and that he wrote these prescriptions for excessive amounts of morphine, that is to say, excessive in this, that he wrote the prescriptions for amounts of morphine for a great number of doses of morphine, more than was sufficient for the necessity of any one particular administration of it, and that by virtue of his writing these prescriptions for these large amounts or excessive amounts of morphine, more than sufficient for any one particular administration of it, that this caused these prescriptions to be filled by the druggists and these excessive amounts of morphine to thus be put into the hands of an addict to be self-administered by them over a succeeding period of days, considerable number of days, with nothing to guide or direct the self-administration of that morphine except the weakened will of the addicts themselves, if you find such a state of facts as that, gentlemen, then the law declares that the defendant has violated the law, and as I say, it would be no defense to him, gentlemen, that the druggists would not fill the prescriptions for smaller amounts, because he would not be compelled to violate the law. He might dispense the morphine himself without the use of a prescription, but how the facts in this case are it is for you to determine as to the amounts of the prescriptions, whether written for more than was necessary for any particular administration, or whether more than was necessary was put into the unrestricted control of an addict with nothing to prevent them from taking it as directed except

> their own weakened will; how all these facts are it is for you to determine, gentlemen of the jury."
> R. 86.

The personal and professional character of Dr. Boyd, the petitioner, was abundantly established without any proof to the contrary.

R. 61, 65-71.

There is no evidence in the record which shows or tends to show that the petitioner tried to "dodge the law" and acted in "bad faith"; but on the contrary, all the evidence establishes that petitioner was wedded to the idea that he had a solvent for morphinism and was deeply anxious to demonstrate its efficacy.

There is no evidence that even tends to show that the parties for whom petitioner prescribed narcotics ever sold or intended to dispose of the drugs obtained through petitioner's prescriptions.

There is no evidence that shows or tends to show that petitioner ever prescribed narcotics for any person who was not his patient.

All the evidence shows that petitioner acted within ethical proprieties and that his prescription (his antidote for morphinism) was professional and "sound and sane."

This is a brief, correct summary of the facts, which may or may not have been stated, for the consideration of this Honorable Court. Counsel felt it proper to do so.

BRIEF AND ARGUMENT

We submit when the Trial Judge charged the jury, as herein set out, and the Court of Appeals affirmed the correctness of the charge, that both Courts misinterpreted the purposes and the scope of the HARRISON NARCOTIC ACT, and were, therefore, in fatal error.

R. 88, 89.

It is unusual that counsel for the Government and counsel for petitioner rely upon the same authorities for the correctness or incorrectness of this charge, each predicating their contention mainly on the following cases:

Webb et al v. United States, 249 U. S. 96;
Jin Fuey Moy v. United States, 254 U. S. 189;
United States v. Behrman, 258 U. S. 280.

Fortunately for the petitioner, the contention of his counsel, as we think, has been *since* sustained in the case of *Linder v. United States*, Sup. Ct. Vol. 45, No. 13, May 1st, 1925, page 446.

This opinion, it seems to us, makes it unnecessary to discuss the Webb, Jin Fuey Moy, or Behrman cases. Had this opinion been delivered by your Honors before the trial of the instant case this case no doubt would not have been before the Court for review.

In the Linder case the Court, speaking through Mr. Justice McReynolds, among other things, announces

what we conceive to be the fundamental rule marking the dividing line between the Government and the States, to-wit:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."
>
> Ibid 449.

Then again Mr. Justice McReynolds uses the following language in said opinion with reference to the Behrman case, on which the Government predicated its insistence for a conviction of petitioner, to-wit:

> "The opinion cannot be accepted as authority for holding that a physician, who acts bona fide and according to fair medical standard, may never give an addict a moderate amount of drugs for self-administration in order to relieve conditions incident to addiction. Enforcement of tax demands no such drastic rule and if the Act had such scope it would certainly encounter grave constitutional difficulty."
>
> Ibid 450.

The Harrison Narcotic Act was held constitutional purely upon the ground of it being a Revenue Act and any effort to construe the Act beyond this purpose goes beyond the intention of Congress in passing it. If Congress had intended said Act as a penal Statute enacted for the purpose of directing and controlling the professional judgments of physicians throughout the country

in their effort to relieve their patients, the Act no doubt would have long since been declared unconstitutional.

Surely the law makers for the Government have never indulged the fanciful idea that they had the constitutional power to direct and control the professional judgment of physicians, and it is not surprising, but altogether reassuring, that this Court should have said in the Behrman case:

> "It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the Act; * * * Undoubtedly, doses may be varied to suit different cases as determined by the *judgment* of a physician."
>
> Ibid 55.288

The following portion of the charge of the Trial Court complained of we submit is equivalent to a positive direction to the jury to return a verdict of guilty in this case, and it assumes to control the judgment of a physician in the treatment of his patients:

> "If you believe beyond a reasonable doubt that as to these patients, or so-called patients, or as to any of them, that he wrote for them these prescriptions or for any of them the prescriptions set out in the indictment, and that he wrote these prescriptions for excessive amounts of morphine, that is to say, excessive in this, that he wrote the prescription for amounts of morphine for a greater number of doses of morphine, more than was sufficient for the necessity of any one particular administration of it, and that by virtue of his writing these prescriptions for these large amounts or excessive amounts of morphine, more than sufficient for any one particular administra-

> tion of it * * * and these excessive amounts of morphine to thus be put in the hands of an addict to be self-administered by them over a succeeding period of days, considerable number of days, with nothing to guide or direct the self-administration of that morphine except the weakened will of the addicts themselves, if you find such a statement of facts as that, gentlemen, then the law declares that the defendant has violated the law."
>
> R. 86.

This is just what this Honorable Court says in the Linder case is not the law. And this, of course, is what necessarily secured a conviction.

We confidently assume, therefore, this Court will reverse this case.

Respectfully submitted,

Sam E. WHITAKER ~~& FOUST,~~

Attorneys for Petitioner.